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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/699,469	10/31/2003	Heather Lynn Focht	9081M	2774

27752 7590 11/14/2007  
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CINCINNATI, OH 45224

EXAMINER
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OGDEN JR, NECHOLUS

ART UNIT	PAPER NUMBER
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1796

MAIL DATE	DELIVERY MODE
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11/14/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Office Action Summary**

Application No.

10/699,469

Applicant(s)

FOCHT ET AL.

Examiner

Necholus Ogden

Art Unit

1796

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 02 August 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1,2,4-20,23-39 and 41-54 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2,4-20,23-39 and 41-54 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

***Response to Amendment***

1. Applicant's request for reconsideration of the finality of the rejection of the last Office action is persuasive and, therefore, the finality of that action is withdrawn.

***Claim Rejections - 35 USC § 112***

2. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

3. Claims 7 13, 18, 26, 32 and 37 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.
4. Claims 7 and 26 state the phrase "substantially free of surfactants"; however, the examiner asserts that the support for said terminology cannot be located in applicant's specification.
5. Claims 13 and 32 state the range of "3 to about 60% by weight of a cleansing phase. The examiner contends that said range is not supported by applicant's disclosure. The examiner asserts that applicant does have support for 1 to 50%; 5-25% and 4-20% as stated on page 5, lines 21-25 of applicant's specification, it appears the range in question is not supported by the disclosure in the specification.
6. Claims 18 and 37 state the component "cationic polymer". The examiner asserts that applicant's disclosure does not support the inclusion of any cationic polymer in any

proportion. It is noted that applicant does include specific cationic polymers in the examples in specific proportions; however, it appears that the aforementioned claims are not supported for every cationic polymer in any proportions.

***Claim Rejections - 35 USC § 103***

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

9. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

10. Claims 1-13, 16-20, 22-32 and 35-39, 41-54, are rejected under 35 U.S.C. 103(a) as being unpatentable over Mitra (6,534,457) or Hayward et al (6,534,456) in view of Lavaud (5,914,117).

Mitra or Hayward et al discloses a plurality of liquid cleansing compositions in lamellar phase, which are contained in partionless container. The multiphase composition is stable upon storage and is dispensed as striped product where typically one stripe has a cleansing function and a second stripe has a moisturizing function (see abstract, respectively). Mitra or Hayward et al further teach that said compositions have a viscosity of at least about 80,000 centipoise and are stable for at least 4 months at room temperature (col. 3, line 55-col. 4, line 25 and col. 4, lines 5-47, respectively). With respect to the cleansing compositions, Mitra or Hayward et al teach that said compositions comprise at least 5% by weight of a cleansing composition comprising surfactants (col. 4, lines 49-65 and col. 5, lines 9-25); lamellar structurants such as fatty alcohols, esters or trihydroxystearin (col. 9, lines 15-35 and col. 10, lines 1-10, respectively); emollients in an amount from 0 to 70% by weight and comprise lanolin alcohols, lanolin, triglycerides, esters, silicone oils such as dimethicone and fatty acid oils (col. 9, lines 39-67 and col. 10, lines 18-44, respectively). Mitra or Hayward et al specifically teach that said compositions include titanium dioxide or zinc stearate particles, cationic conditioning agents, antibacterial, antioxidants and viscosity adjusting agents (col. 10, lines 4-38 and col. 11, lines 1-25, respectively). With respect to the container, Mitra or Hayward et al teach that said containers are transparent (col. 11,

lines 1-5 and col. 12, lines 25-35, respectively). See examples 1 and table 2, respectively).

Mitra or Hayward et al do not specifically teach with sufficient specificity applicant's density of the benefit phase. However, because Mitra or Hayward et al each teach the specific surfactants, emollients in their requisite proportions and absent a showing to the contrary, one of ordinary skill would have expected the compositions to encompass the density since several preferred benefit agents are suggested by Mitra or Hayward. Furthermore, it is held that "it is not necessary in order to establish a prima facie case of obviousness . . . that there be a suggestion or expectation from the prior art that the claimed [invention] will have the same or a similar utility as one newly discovered by applicant," and concluded that here a prima facie case was established because "[t]he art provided the motivation to make the claimed compositions in the expectation that they would have similar properties." 919 F.2d at 693, 16 USPQ2d at 1901.

11. Mitra or Hayward et al do not disclose with sufficient specificity applicant's low density microsphere.

12. Lavaud disclose a composition for face cleansing or shaving comprising an ester; water soluble soaps, and low density modifiers such as expanded microspheres and water (col. 2, lines 39-62 and example 1).

13. Mitra or Hayward et al do not specifically teach with sufficient specificity applicant's stripe size width, Shear Index or Consistence Value. However, because Mitra or Hayward et al each teach the specific surfactants, emollients in their requisite

proportions and absent a showing to the contrary, one of ordinary skill would have expected the compositions to encompass applicant's stripe size width, Shear Index or Consistence Value as suggested by Mitra or Hayward. Furthermore, it is held that "it is not necessary in order to establish a prima facie case of obviousness . . . that there be a suggestion or expectation from the prior art that the claimed [invention] will have the same or a similar utility as one newly discovered by applicant," and concluded that here a prima facie case was established because "[t]he art provided the motivation to make the claimed compositions in the expectation that they would have similar properties." 919 F.2d at 693, 16 USPQ2d at 1901. Moreover, It would have been obvious to one of ordinary skill in the art to include the microspheres of Lavaud to the compositions of Mitra or Hayward et al because Lavaud teaches low density modifier in skin cleansing formulations and the skilled artisan would have been motivated to include said low density particles to aid as an exfoliant or to enhance the gel formulations for increase delayed reactions. Accordingly, in the absence of a showing to the contrary, one skilled in the art would have been motivated to combine the references for their intended purpose.

14. Claims 14-15 and 33-34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mitra (6,534,457) or Hayward et al (6,534,546) in view of Lavaud (5,914,117) and further in view of Williams et al (6,429,177).

15. Mitra or Hayward et al do not teach an electrolyte component.

16. Williams et al disclose a separating multiphase wash component composition in a transparent container, wherein said composition comprises surfactants, thickener,

polyols, and electrolytes (col. 2, lines 45-col. 3, and line 5). Williams et al teach that said electrolyte comprises salts of sulfates, carbonates and bisulphate's (col. 3, lines 28-33) and in an amount from less than 25% by weight.

17. It would have been obvious to one of ordinary skill in the art to include the electrolyte of Williams et al to the compositions of Mitra or Hayward et al because Mitra or Hayward et al teach multiphase compositions and Hayward et al suggests electrolytes are included in phase separation or portioning layers (col. 2, lines 15-21). Accordingly, in the absence of unexpected results, one of ordinary skill in the art would have been motivated to include the electrolyte to further induce separation of stripes as suggested by Williams et al.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Necholas Ogden whose telephone number is 571-272-1322. The examiner can normally be reached on M-Thu.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon can be reached on 571-272-1498. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.



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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
Nicholas Ogden  
Primary Examiner  
Art Unit 1796

No  
November 10, 2007